

The Criminal Procedure Road Not Taken: Due Process and the Protection of Innocence

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From 1961 until 1969, the Warren Court busily “incorporated” most of the Bill of Rights criminal procedure guarantees into the Fourteenth Amendment Due Process Clause. The standard objections to that doctrinal move were that the intent of the Framers of the Fourteenth Amendment is less clear than many have argued and that incorporation deprived the states of needed flexibility in dealing with criminal justice issues. The present article lodges a new objection: incorporation was misguided because it left criminal suspects and defendants with a criminal procedure based almost exclusively on process. A process focus means that factually innocent suspects and defendants are treated just like the guilty. If a suspect/defendant gets the right procedure, the Warren Court’s criminal procedure doctrine is uninterested in the outcome. For example, if a defendant waives his Miranda rights, courts do not seem to care that the confession was pressured from him or, indeed, even that it is untrue. If a defendant is appointed a lawyer, who decides not to move to suppress a statement made to a state psychiatrist, it seems not to matter that counsel’s decision forfeited the defendant’s best chance to avoid the death penalty. Another example is the Court’s eyewitness identification doctrine, which is widely condemned as too feeble to protect against misidentifications. This article argues that had the Court chosen to invigorate the Due Process Clause in the context of criminal investigations and prosecutions, it would have been prompted to provide more substantive protections for the factually innocent. This article explores how that due process criminal procedure world might have developed, and argues that it would be a better criminal procedure world than the one we inhabit today.

In 1961, the Supreme Court came to a brightly-lit fork in the criminal procedure road. The Court took one road and then quickly came to another fork. The roads

* Professor of Law & Judge Alexander P. Waugh, Sr. Distinguished Scholar, Rutgers University, Newark. I thank Joshua Dressler and Dorollio Nixon for helpful comments on an earlier version of this review and Mr. Nixon and Kegan Brown for research assistance. I thank the Dean’s Research Fund at Rutgers University School of Law, Newark for partial support for my research. My greatest debt is to my friend, Don Dripps, who started me thinking about a return to due process years ago. Every time I taught *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Douglas v. California*, 372 U.S. 353 (1963), I thought Justice Harlan’s dissents made mincemeat of the majority’s analysis. But I dismissed these holdings as bad examples of selective incorporation. My discussions over the years with Don led me, finally, to conclude that it was the process of selective incorporation itself that was flawed. For readers interested in longer versions of the argument against incorporation, see DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE (2003); George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers’ Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

leading away from this second fork were, however, dimly lit. The Court took the fork that seemed more promising, confident that it had made the right choice. The first fork was whether to regulate state criminal processes more intensively via the federal Constitution. The Court decided it was time to regulate. The second fork required a choice of the constitutional text that would provide the framework for the regulation. The Court chose essentially the same set of procedural rules that the Framers had embedded in the Bill of Rights, rights intended to prevent abuse of the federal criminal process. The Court's term for this process was "selective incorporation."

When I was in law school in the early 1970s, it was clear to me that Justice John Marshall Harlan had the most able mind of the Justices who sat on the Warren Court. So I was especially troubled that he rejected incorporation. How could someone as smart as Harlan miss what I thought was an obvious truth: the federal courts needed tools with which to regulate state criminal processes? The answer, I now think, is that Harlan alone saw the future that the rest of the Court did not see. Harlan saw that the criminal procedure guarantees of the Framers were incapable of guaranteeing the kind of equality and procedural fairness sought by the Court of Chief Justice Earl Warren. Second, and more ominously, the critical crime control function of states would pressure the Supreme Court to interpret the Bill of Rights in a parsimonious fashion, leading to narrower, not broader, rights.¹

I have developed these points before.² The principal purpose of this article is to advance a thesis about the effect of incorporation on factually innocent defendants. I will argue that the most unfortunate consequence of incorporation was that it distracted state and federal courts alike from the "prime directive" of a criminal process: to protect the innocent at all reasonable costs.³ Incorporation led, quite directly, to doctrines that encourage, or permit, police and prosecutors to ignore innocence. Innocence ignored is innocence betrayed.

Thus, the road taken by the Warren Court led to the worst set of outcomes one could have imagined. Imposing the Bill of Rights guarantees on the states did not produce a fair and just process. It led later Courts to restrict rights. And it harmed innocent defendants.

While it is surely too late to go back in time and undo the Warren Court incorporation of the criminal procedure Bill of Rights guarantees, I wish to engage in a thought experiment. I have no doubt the Warren Court was right in 1961 that the time had come to impose serious federal controls on state criminal processes. The Court thus navigated the first fork correctly. Though that decision produced much consternation and debate in the 1960s, the Court deserves credit for its resoluteness in

¹ For a careful and persuasive exposition of this phenomenon, see CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

² See George C. Thomas III, *When Constitutional Worlds Collide: Resurrecting the Framers' Criminal Procedure*, 100 MICH. L. REV. 145 (2001).

³ An excellent presentation of the argument for this "prime directive" of any criminal process is contained in DONALD A. DRIPPS, *ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE* (2003).

subjecting state police, prosecutors, and judges to federal control. But what if the vehicle of choice had not been the procedural protections in the Bill of Rights but, rather, an invigorated due process regime that had, as its principal goal, the protection of innocent defendants? That was the choice presented at the second fork and, in my judgment, the Court took the wrong road. As Donald Dripps has put it, “[b]efore the Warren Court, we gave the wrong answers, and since the Warren Court, we asked the wrong questions.”⁴

Due process, unlike the procedural protections in the Bill of Rights, invites a look at the individual case and thus offers a more promising avenue for protecting the innocent. Due process was Justice Harlan’s vehicle of choice for addressing the regulation of state criminal systems. It was not that he failed to see that systemic problems required systemic solutions. Harlan, after all, joined Justice Black’s opinion in *Gideon v. Wainwright*,⁵ which reversed *Betts v. Brady*⁶ and found in the Due Process Clause a requirement that states provide counsel to indigent defendants facing felony prosecutions.⁷ Justice Harlan’s insistence on due process as the regulatory vehicle of choice was based on his belief that a due process remedy could fit more narrowly to solve the problem presented.⁸ Ultimately, I hope to persuade the reader that Harlan was right to seek to invigorate due process rather than to incorporate the specific criminal procedure guarantees of the Bill of Rights.

I. WHY INCORPORATION?

Everyone knows the story of selective incorporation of the Bill of Rights guarantees into the Fourteenth Amendment. Of the critical rights in the First, Fourth, Fifth, Sixth, and Eighth Amendments, only the right to a grand jury indictment and the right against excessive bail and fines have not been incorporated into the Fourteenth Amendment. But for almost a century after the Fourteenth Amendment was ratified, the Court’s regulation of state criminal processes ignored the rights in the

⁴ DRIPPS, *supra* note 3, at xix.

⁵ 372 U.S. 335 (1963).

⁶ 316 U.S. 455 (1942).

⁷ Harlan wrote a separate concurring opinion, but only because he quibbled with Black’s contention that *Betts* was “an abrupt break” with precedent when it was decided. See *Gideon*, 372 U.S. at 349 (Harlan, J., concurring). This argument between Black and Harlan was yet one more manifestation of their very different jurisprudential theories. For Black, it was important that *Betts* was incorrectly decided because he rejected the idea that the Constitution could evolve to meet modern needs. Justice Harlan held the opposite view. He believed that the understanding of due process does evolve over time. For a brief account of these views, see *infra* note 139 and text accompanying note 140.

⁸ A good example of a more narrowly tailored remedy can be seen in Harlan’s dissent in *Douglas v. California*, 372 U.S. 353 (1963), discussed *infra* notes 96–101 and accompanying text. Decided the same day as *Gideon*, *Douglas* applies a blanket rule, which Harlan rejected in favor of a narrower solution.

Bill of Rights.⁹ The Court's vehicle for regulation, sparingly applied, was the Due Process Clause of the Fourteenth Amendment.

An example is *Maxwell v. Dow*.¹⁰ The issue was whether a criminal conviction returned by an eight-member jury violated the Fourteenth Amendment. The Court assumed that this kind of conviction would violate the Sixth Amendment and then engaged in a very long analysis, drawing heavily from *Slaughter-House Cases*,¹¹ demonstrating that the right to a verdict by a twelve-person jury was not a privilege or immunity guaranteed by the Fourteenth Amendment. Thus, the Sixth Amendment was irrelevant. When the Court finally got around to discussing whether the Fourteenth Amendment was violated, the analysis was pretty superficial. Having held, in *Hurtado v. California*,¹² that states could vary the common law right to an indictment, the Court reasoned that, *a fortiori*, states could vary the number of jurors on a criminal jury.¹³ Indeed, the Court suggested that trial by jury, by any number of jurors, was not part of due process,¹⁴ a suggestion that I shall endorse later in the article.

Of the criminal procedure rights in the Bill of Rights, the first incorporation was not until 1961 when the Court required states to follow the Fourth Amendment exclusionary rule and suppress evidence that had been unconstitutionally seized.¹⁵ In the next eight years, the Court would incorporate the right not to be subjected to cruel and unusual punishments,¹⁶ the right to counsel,¹⁷ the privilege against compelled self-incrimination,¹⁸ the right to confront witnesses,¹⁹ the right to a speedy trial,²⁰ the right to compel the attendance of witnesses,²¹ the right against double jeopardy,²² and the right to a jury trial.²³

⁹ The Fourteenth Amendment was ratified in 1868. The first full reliance on a specific criminal procedure amendment to decide a due process question was the 1961 case of *Mapp v. Ohio*, 367 U.S. 643 (1961). To be sure, *Wolf v. Colorado*, 338 U.S. 25 (1949), held that the core privacy right granted by the Fourth Amendment was implicit in the Due Process Clause, but *Wolf* refused to require states to use the Fourth Amendment's exclusionary rule to vindicate that privacy right.

¹⁰ 176 U.S. 581 (1900).

¹¹ 83 U.S. 36 (1872).

¹² 110 U.S. 516 (1884).

¹³ *Maxwell*, 176 U.S. at 602-03.

¹⁴ *Id.* at 603.

¹⁵ *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁶ *Robinson v. California*, 370 U.S. 660 (1962).

¹⁷ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁸ *Malloy v. Hogan*, 378 U.S. 1 (1964).

¹⁹ *Pointer v. Texas*, 380 U.S. 400 (1965).

²⁰ *Klopfer v. North Carolina*, 386 U.S. 213 (1967).

²¹ *Washington v. Texas*, 388 U.S. 14 (1967).

²² *Benton v. Maryland*, 395 U.S. 784 (1969).

²³ *Duncan v. Louisiana*, 391 U.S. 145 (1968). The right to a public trial has never been explicitly incorporated into the Fourteenth Amendment, but the Court held in *In re Oliver*, 333 U.S. 257 (1948),

The precise reasons why the Court chose to incorporate the criminal procedure guarantees will likely never be known. It seems clear enough that the Court had grown increasingly troubled by the cavalier attitude of state officials toward suspects and defendants. Some state cases raised questions about innocent defendants being convicted and often sentenced to die. More frequently, the cases exhibited indifference to the rights of citizens to keep police out of their homes and to keep police from coercing or tricking confessions from them.

Underlying these concerns was a belief that state officials were mistreating those with less power—the poor and racial minorities. In addition, the 1960s was a period when the country was finally drawing together to condemn the Jim Crow regime in the South. We were also drawing together physically, with the construction of the vast interstate system and the advent of jet travel from coast to coast. Partly as a result of our drawing together physically as well as on issues of racial equality, the Court expanded the Commerce Clause to give Congress almost limitless power to require homogeneity in many activities.²⁴

The argument for one set of criminal procedure rights drew strength once we thought of ourselves as one country. The Warren Court wielded its power, and by 1969 the deed was done. With the exception of the grand jury right and the right against excessive fines and bail, criminal suspects and defendants in state court had the same rights as federal defendants. It seems likely that when Chief Justice Warren retired, he looked with fondness on this part of his legacy. It is clear that, in later years, Justices Brennan and Marshall fought the criminal procedure retrenchments, and they metaphorically (if not actually) wept when the Burger and Rehnquist Courts cut back on the scope of rights guaranteed to state suspects and defendants.

A good example of Justice Brennan's view of the retrenchment is in his dissent in the cases announcing the "good-faith" exception to the Fourth Amendment exclusionary rule.²⁵ The Court held that, in certain circumstances, evidence obtained pursuant to an invalid search warrant can be admitted despite the violation of the Fourth Amendment. In dissent, Justice Brennan noted that

that the Due Process Clause itself guarantees a public trial. The matter being settled as an interpretation of the Fourteenth Amendment itself, there would be no need to consider the incorporation of that Sixth Amendment right into the Fourteenth Amendment.

²⁴ See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 256 (1964) (holding that Congress may proscribe racial discrimination in motel accommodations, regardless of the local nature of a particular establishment's business, since "the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question"); *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (holding that Congress may legitimately compel restaurant owners to serve blacks under its Commerce Clause powers if a substantial portion of the restaurant's food has moved through interstate commerce; stating that "where [Congress] keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere"); see also *Daniel v. Paul*, 395 U.S. 298, 307 (1969) (holding that a privately-owned lakeside place of amusement is within the reach of Congress acting under its Commerce Clause powers due to the "overriding purpose of Title II [of the Civil Rights Act of 1964]").

²⁵ *United States v. Leon*, 468 U.S. 897 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981 (1984).

in case after case, I have witnessed the Court's gradual but determined strangulation of the [exclusionary] rule. It now appears that the Court's victory over the Fourth Amendment is complete. That today's decisions represent the *piece de resistance* of the Court's past efforts cannot be doubted, for today the Court sanctions the use in the prosecution's case in chief of illegally obtained evidence against the individual whose rights have been violated—a result that had previously been thought to be foreclosed.²⁶

What were the dreams of the Warren Court and what has been the reality? The basic dream was, I believe, a world in which state police, prosecutors, and judges treat suspects and defendants fairly. In this context, fairness entails a rough equality between rich and poor and between black and white. Equality requires that suspects and defendants have the ability to make informed decisions and to act on those decisions. Hence, the centerpiece of the Court's criminal procedure revolution was to require that states provide lawyers to indigent defendants. Of second greatest importance, probably, was the requirement in *Miranda v. Arizona*²⁷ that suspects be warned of the consequences of answering police questions, be informed of their right not to answer the questions, and be offered a lawyer to assist them in deciding whether to answer. The third major pillar of the Warren Court revolution was to require states to suppress evidence found in violation of the Fourth Amendment. Equality between rich and poor and between black and white includes an equal respect for the privacy of the home and the person. Random searches would undoubtedly be (and are in fact today) directed much more frequently at the poor and the black than the white middle class.

If that was the dream, we must determine to what extent the criminal procedure revolution achieved the dream. We should also attempt to assess the consequences of pursuing the dream of fairness and equality in the realm of criminal procedure. The answers I reach, in Parts II and III, are that the costs were very high and the dream was, and always will be, impossible to achieve through mandated changes in criminal justice systems. After I have made these arguments, I shall consider how some criminal procedure rights might have quite different content today if the Court had rejected incorporation theory in favor of a revitalized due process theory. I hope to begin to sketch a new account of constitutional criminal procedure to show that the road not taken by the Warren Court was the right road.

II. THE COSTS OF INCORPORATION

As I have written elsewhere,²⁸ the last forty years have seen the narrowing of the scope of criminal procedure guarantees, in some cases dramatically, partly as a consequence of forcing the states to provide these rights in cases involving serious

²⁶ *Leon*, 468 U.S. at 928–29 (Brennan, J., dissenting).

²⁷ 384 U.S. 436 (1966).

²⁸ Thomas, *supra* note 2.

crimes like robbery, rape, murder, and burglary. In Dripps's words, "[t]he liberal old interpretations of the Bill of Rights found in the pre-incorporation federal cases have gone the way of the buffalo. Harlan was right and Black was wrong. The 'specific guarantees' in the Bill of Rights have not survived the policy considerations in state cases."²⁹

One example will suffice as this consequence is not the focus of the current article. Prior to 1961, states were permitted to use unconstitutionally seized evidence in criminal trials. The Fourth Amendment's exclusionary rule applied only to those suspected of committing federal crimes. The number of federal criminal investigations in 1961 was minuscule compared to the number of investigations of state crimes. Thus, the Fourth Amendment "cost" to the nation's crime fighting apparatus was trivial.³⁰ Once states were required to apply the exclusionary rule, however, the potential cost became astronomical overnight.

Prior to the "inflation" in the cost of the Fourth Amendment, its protections were remarkably robust. Indeed, I believe many students of the Constitution today are unaware of how robust the Fourth Amendment was. The Court's language in *Boyd v. United States*³¹ suggested that no valid subpoena could ever issue for private books and records in a criminal or quasi-criminal case.³² The Court also held that the Fourth Amendment forbade the seizure of lawfully-possessed property in a home or office even by means of a search warrant unless the government could show a superior legal interest in the property.³³ Yes, that is not a misprint. In 1921, *Gouled v. United States* held that even a duly issued search warrant would not justify the seizure from an office of documents that could be used to prove fraud but were not themselves contraband or fruits of a crime. In 1928, the Court noted that *Gouled* "carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication, and must be confined to the precise

²⁹ DRIPPS, *supra* note 3, at 47.

³⁰ I ignore here the fact that some states had read their own constitutions to require the exclusion of evidence. This is not a "cost" of the Fourth Amendment and, moreover, I believe that when states choose to provide rights on their own, courts in those states may be less stinting in the interpretation of the rights. For more than two centuries, states have resented, to a greater or lesser extent, imposition of controls from the federal government.

³¹ 116 U.S. 616 (1886).

³² What I state in the text is not the narrow holding. The relevant statute provided that a refusal to provide the documents would constitute a confession of the contents of the order requesting production. This "confession" caused the Court to rely in part on the Fifth Amendment privilege against compelled self-incrimination and is probably critical to the holding that the statute was unconstitutional. But the gist of the analysis is that "papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection . . ." *Id.* at 627-28 (quoting *Entick v. Carrington*, 19 Howell's State Trials 1929 (1765)). It is this broad language to which I refer in the text, rather than the narrow holding.

³³ *Gouled v. United States*, 255 U.S. 298 (1921). *Gouled* thus protected papers, documents, and all other lawfully-possessed property. On the other hand, the government could seize by search warrant fruits of a crime, instrumentalities of a crime, contraband, and property subject to customs' duties and other recording requirements.

state of facts disclosed by the record.”³⁴ Yet it was still Fourth Amendment law until overruled in 1967 by the Warren Court, in a state case, in an opinion by Justice Brennan.³⁵

Thus, only six years after the Fourth Amendment was applied to the states, the Court had already begun narrowing it by rejecting a fifty-year-old precedent. Whether or not *Gouled* was correctly decided, and Morgan Cloud argues that it represented an “extreme form of the mere evidence rule” that was appropriately discarded,³⁶ the point is that it took incorporation to nudge the Court along that path. This speaks volumes about the costs of incorporation.

I think I can safely conclude, without having to cite cases, that today’s Fourth Amendment is not nearly as robust as the one sketched a moment ago. Today we have “the worst of all Fourth Amendment worlds, in which the Amendment is hard to trigger, harder to violate when it applies, virtually impossible to enforce when it is violated, and yet is thought of as the Constitution’s primary, almost exclusive, regulation of the police.”³⁷ The Fourth Amendment should, but largely fails to, protect the innocent.³⁸ The Court has constructed a Fourth Amendment that not only has parsimonious protection but also lacks a coherent theory. Put together the shrinking Fourth Amendment with its growing incoherence and we have Cloud’s conclusion: “Fourth Amendment theory is in tatters at the end of the twentieth century.”³⁹ Craig Bradley has famously called the Fourth Amendment “the Supreme Court’s tarbaby: a mass of contradictions and obscurities that has ensnared the Court in such a way that every effort to extract itself only leaves it more profoundly stuck.”⁴⁰

Of course, many factors contributed to a Fourth Amendment that shrank at the same time it grew incoherent, including the rise of organized crime and the federal war on drugs. But we must not ignore the change in who was advocating for a broad Fourth Amendment. Edward Boyd, who opposed the subpoena for his records in 1886, was an importer and dealer in plate glass in New York City who was charged with failing to pay proper duties on thirty-five cases of plate glass.⁴¹ Felix Gouled, who resisted the seizure of documents pursuant to a search warrant, was charged with a conspiracy to defraud the federal government “through contracts with it for clothing and equipment.”⁴² I do not minimize the seriousness of a conspiracy to defraud the

³⁴ *Olmstead v. United States*, 277 U.S. 438 (1928).

³⁵ *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

³⁶ Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 597 (1996).

³⁷ DRIPPS, *supra* note 3, at 54.

³⁸ Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

³⁹ Cloud, *supra* note 36, at 555.

⁴⁰ Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1983).

⁴¹ SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* 49 (2004).

⁴² *Gouled v. United States*, 255 U.S. 298, 304 (1921).

government, but compare *Gould* to the defendants advocating for a robust Fourth Amendment in cases where the Court made new and narrow Fourth Amendment law: buying sex from young men by providing them marijuana;⁴³ armed robbery (four cases);⁴⁴ and murder of the defendant's girlfriend by crushing her skull.⁴⁵ In *Coolidge v. New Hampshire*,⁴⁶ the Court was splintered and could not find a majority for the proposition that the police lacked the authority to search a car that had been used in the kidnapping, rape, and murder of a fourteen-year-old girl. Perhaps the greatest erosion of Fourth Amendment rights came in the wake of *Terry v. Ohio*,⁴⁷ where the Court permitted a police officer to intervene in and prevent a daylight robbery even though he lacked probable cause. These are the kinds of cases where courts, even the Supreme Court, strain to sustain convictions and give police greater, not lesser, latitude. If Edward Boyd and Felix Gould avoided conviction, that is one kind of fact in the legal universe. If defendants who rape and murder young woman escape justice, that is quite another kind of fact.⁴⁸

The failure of the Warren Court criminal procedure revolution in other areas is equally manifest. Though all indigent defendants charged with a felony, and many charged with misdemeanors, are offered appointed counsel today, the evidence is overwhelming that this assistance is, on average, mediocre and often much worse.⁴⁹ The Court must have intended the right to counsel to provide more benefit than it has to date. Though almost all arrested suspects receive the famous *Miranda* warnings, the evidence shows that about eighty percent waive those rights and most wind up incriminating themselves.⁵⁰ Now perhaps all the Warren Court intended in *Miranda*

⁴³ See *California v. Carney*, 471 U.S. 386 (1985) (establishing that a motor home can be searched without a warrant).

⁴⁴ See *Horton v. California*, 496 U.S. 128 (1990) (rejecting an earlier limitation on plain view seizures); *Rakas v. Illinois*, 439 U.S. 128 (1978) (establishing that a car passenger typically has no Fourth Amendment right to object to the admission of evidence found in the car); *Chambers v. Maroney*, 399 U.S. 42 (1970) (establishing that a car can be seized, taken to a police lot, and searched hours later without a warrant); *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gould* and establishing that police who are lawfully on the premises can seize any evidence of a crime).

⁴⁵ *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (applying good faith exception to the exclusionary rule when officers try, but fail, to obtain a valid search warrant).

⁴⁶ 403 U.S. 443 (1971).

⁴⁷ 392 U.S. 1 (1968).

⁴⁸ I do not mean to claim that all of the Court's seminal Fourth Amendment cases involved dangerous or gruesome crimes. The first clear statement that any kind of arrest gives police the right to search the person came in a case that involved driving on a revoked license. See *United States v. Robinson*, 414 U.S. 218 (1973). The case setting the low standard for establishing consent to search involved three stolen checks. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The cases that created open season on open fields involved growing marijuana. See *Oliver v. United States*, 466 U.S. 170 (1984) (companion cases). Rather, my point is that the Court is painfully aware that the rules it creates under the Fourth Amendment will be available to defendants who are extremely dangerous.

⁴⁹ See *infra* notes 80–87 and accompanying text.

⁵⁰ See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 859 tbl. 3 (1996) (showing waiver rate of eighty-four percent); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 tbl.3

was that suspects who succumb to persistent police interrogation have some superficial understanding that they do not have to answer questions. The *Miranda* opinion suggests otherwise. It suggests that the Court wanted to imbue suspects with the capacity to make a "free choice" in the interrogation room.⁵¹ If that was the goal, *Miranda* has been a failure.

Thus, the dream of a robust Fourth Amendment that protects the privacy of rich and poor alike has not been realized. The dream of suspects capable of making up their own minds whether to confess has not been realized. The dream of defendants who are on an equal footing with the prosecutor in legal maneuvering has been realized at a procedural level but not substantively. And what is the cost of the revolution that (largely) failed?

The consequence of the criminal procedure revolution that I wish to focus on is not the narrowing of the Bill of Rights but what I will call "the loss of innocence." For over a century, the Court used the Due Process Clause to evaluate outcomes of state criminal processes. While the analysis was deferential and amorphous, the Court seemed to worry more about procedures that threatened to convict innocent defendants, and that makes perfectly good sense. In summarizing earlier cases seeking to regulate state criminal justice systems, Justice Cardozo wrote that due process guaranteed "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."⁵² And a fundamental principle of liberty and justice is that defendants should be tried in a way that does not unduly threaten the conviction of the innocent.⁵³

Though the Court was loathe to intervene in state criminal processes in the early twentieth century, two famous cases from the South forced the Court's hand. In *Powell v. Alabama*,⁵⁴ the Court reversed state criminal convictions and death sentences imposed on nine black men for the alleged gang rape of two white women. Little need be said here about the Court's opinion, holding that the failure to provide the assistance of counsel violated due process, but a quote from historian James Goodman's riveting book provides details about what Southern justice looked like when white women accused black men of raping them.

(1996) (showing waiver rate of seventy-eight percent). I recently published a study based on a sample of cases drawn from Westlaw. Most of the cases were appellate cases where the waiver rate should be lower because obvious instances of waiver are less likely to lead to an appeal. Even so I found a waiver rate of sixty-eight percent. See George C. Thomas III, *Stories About Miranda*, 102 MICH. L. REV. 1959, 1972 tbl.2 (2004).

⁵¹ See, e.g., George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture?*, in 29 CRIME AND JUSTICE: A REVIEW OF RESEARCH 203 (Michael Tonry ed., 2002).

⁵² *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

⁵³ See DRIPPS, *supra* note 3, at 102 ("preventing the punishment of the innocent has priority over punishing the guilty").

⁵⁴ 287 U.S. 45 (1932).

Writers and editors all over the region agreed that it was the most atrocious crime ever recorded in that part of the country, perhaps in the whole United States, "a wholesale debauching of society . . . so horrible in its details that all the facts could never be printed," a "heinous and unspeakable crime" that "savored of the jungle, the way back dark ages of meanest African corruption." They were revolted by the story, but not surprised. Or if surprised, surprised only by the magnitude of the crime. They expected black men to rape white women. Blacks were savages, more savage, many argued (with scientific theories to support them), than they had been as slaves. Savages with an irrepressible sex drive and an appetite for white women. They were born rapists, rapists by instinct; given the chance, they struck. Two white women swore that they had been raped. Even if all nine of the boys had denied it and told the same story it is likely they would have been convicted; accusations much less serious and less substantiated had condemned black men. Bates and Price charged rape. Most of the boys denied it. There was no question in anyone's mind about whom to believe.⁵⁵

Four years later, in *Brown v. Mississippi*,⁵⁶ another Southern state made an even graver and more direct attack on innocence. In "investigating" the murder of a white man, a deputy sheriff decided to torture confessions from three black men. Though everyone reading this article has probably read *Brown*, I include an excerpt here. I have read it dozens of times, but I am always struck by the depravity manifested in the facts:

[O]ne Dial, a deputy sheriff, accompanied by others, came to the home of Ellington, one of the defendants, and requested him to accompany them to the house of the deceased, and there a number of white men were gathered, who began to accuse the defendant of the crime. Upon his denial they seized him, and with the participation of the deputy they hanged him by a rope to the limb of a tree, and having let him down, they hung him again, and when he was let down the second time, and he still protested his innocence, he was tied to a tree and whipped, and still declining to accede to the demands that he confess, he was finally released and he returned with some difficulty to his home, suffering intense pain and agony. The record of the testimony shows that the signs of the rope on his neck were plainly visible during the so-called trial. A day or two thereafter the said deputy, accompanied by another, returned to the home of the said defendant and arrested him, and departed with the prisoner towards the jail in an adjoining county, but went by a route which led into the State of Alabama; and while on the way, in that State, the deputy stopped and again severely whipped the

⁵⁵ JAMES GOODMAN, *STORIES OF SCOTTSBORO* 15–16 (1995).

⁵⁶ 297 U.S. 278 (1936).

defendant, declaring that he would continue the whipping until he confessed, and the defendant then agreed to confess to such a statement as the deputy would dictate, and he did so, after which he was delivered to jail.

The other two defendants, Ed Brown and Henry Shields, were also arrested and taken to the same jail. On Sunday night, April 1, 1934, the same deputy, accompanied by a number of white men, one of whom was also an officer, and by the jailer, came to the jail, and the two last named defendants were made to strip and they were laid over chairs and their backs were cut to pieces with a leather strap with buckles on it, and they were likewise made by the said deputy definitely to understand that the whipping would be continued unless and until they confessed, and not only confessed, but confessed in every matter of detail as demanded by those present; and in this manner the defendants confessed the crime, and as the whippings progressed and were repeated, they changed or adjusted their confession in all particulars of detail so as to conform to the demands of their torturers.⁵⁷

Even for someone like me who grew up in the South in the 1950s and saw overt racism all the time, these are facts that are difficult to comprehend. Perhaps the most incomprehensible part of the entire opinion is the testimony of the deputy, Dial, at the trial. It was not enough that he had orchestrated this torture. He bragged about it in court. After admitting the whippings, he was asked how severely he had whipped Ellington and he said: "Not too much for a negro; not as much as I would have done if it were left to me."⁵⁸

The State conduct in *Brown* trenched even more harshly against the class of innocent defendants than that in *Powell*. One can debate how much a lawyer helps prevent innocent defendants from being convicted. But for centuries, Anglo-American law has recognized that confessions produced by torture are unreliable. Needless to say, *Brown* presents a vivid example of a confession being tortured from suspects.

Surely due process prohibits state actors from torturing us whether they induce a confession or not. Thus, the Court could have condemned the vile conduct of the deputy sheriff as violating the suspects' rights to be free of torture and left it at that. But the *Brown* Court made clear that the due process violation was the threat to innocent defendants. The Court began by citing some acts the State could (in those days) do consistently with due process of law. "The State may abolish trial by jury. It may dispense with indictment by a grand jury and substitute complaint or information."⁵⁹ But the Court noted that a State could *not* "contrive a conviction through the pretense of a trial which in truth is 'but used as a means of depriving a

⁵⁷ *Id.* at 281–82 (quoting *Brown v. State*, 161 So. 465, 470 (Miss. 1935) (Griffith, J., dissenting)).

⁵⁸ *Id.* at 284.

⁵⁹ *Id.* at 285.

defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.”⁶⁰

Brown, the Court reasoned, was no different from the case condemning the deliberate use of perjured evidence. For the defendants in *Brown*, “the trial equally is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence.”⁶¹ So while much about due process was offended by the outrageous and evil conduct demonstrated in *Brown*, the Court chose to analyze it as a failure of a state criminal process adequately to protect against conviction of the innocent. In the Court’s words: “It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.”⁶²

We have, so far as I know, no useful data on how often the state criminal justice systems of the *Brown-Powell* era misfired in ways that required careful federal oversight. But with two such monumental disasters as *Powell* and *Brown*, and given what was known about race relations in the South,⁶³ the Court had little choice but to abandon its hands-off policy toward state criminal proceedings. And for three decades the vehicle of choice was the Due Process Clause of the Fourteenth Amendment, which, after all, provides explicitly that no “State . . . shall deprive any person of life, liberty, or property, without due process of law.”⁶⁴

It is easy to see why in 1937—a year after *Brown*—Justice Cardozo said that due process guaranteed “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.”⁶⁵ While “justice” is far from self-defining, it without doubt entails protecting the innocent. One way to phrase this due process inquiry is “whether the state procedure exposed the defendant to an unnecessary risk of a false conviction.”⁶⁶ This principle is uncontroversial at an abstract level and explains much about the Court’s early forays into the thickets of state criminal systems. But its application in the years immediately prior to incorporation gave the Court trouble and, after incorporation, the Court largely ignored the innocence problem. It seems that the Court made the questionable assumption that the

⁶⁰ *Id.* at 286 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

⁶¹ *Id.* at 286.

⁶² *Id.*

⁶³ As early as 1906, the Court granted a stay of execution in a case from the South where an all-white jury had convicted a black man. See Emily Yellin, *Lynching Victim Is Cleared of Rape, 100 Years Later*, N. Y. TIMES, Feb. 27, 2000, at 24. But a mob stormed the jail, took the prisoner to a bridge where they hung him and “began to riddle” his body with “rounds and rounds of bullets.” *Id.* In the bloodless language of formal judicial opinions, the Court dismissed the appeal on the ground that it was “abated by death of appellant.” *Johnson v. Tennessee*, 214 U.S. 485, 485 (1909). The Court ordered a federal criminal trial of the Chattanooga sheriff, other law enforcement officers, and members of the lynch mob. See MARK CURRIDEN & LEROY PHILLIPS, JR., *CONTEMPT OF COURT* (1999).

⁶⁴ U.S. CONST. amend. XIV.

⁶⁵ *Palko v. Connecticut*, 302 U.S. 319, 328 (1937).

⁶⁶ DRIPPS, *supra* note 3, at 145.

procedures the Framers designed to hamstring federal actors were both necessary and sufficient to protect innocent defendants in state court. But as Donald Dripps has observed, “[t]he Bill of Rights is undesirable in some of its particulars, and inadequate in its entirety, as a constitutional guide to criminal procedure.”⁶⁷

The next Part will examine four examples where, I believe, some of the Bill of Rights guarantees have proved both undesirable and inadequate as a guide to criminal procedure. I will seek to demonstrate four failures of incorporation.

III. DUE PROCESS CRIMINAL PROCEDURE

The right to a jury trial, I will argue, is simply not one of the “fundamental principles of liberty and justice” that due process should protect. The right to counsel is undoubtedly an indispensable part of due process but the Court’s mechanistic application of the right to counsel has left defendants in many cases little better off than if they had no lawyer at all. And with all the focus on procedural rights, the Court has essentially ignored two critical aspects of due process: the right not to have a false confession elicited, and the right against false eyewitness identifications. I will argue that if Justice Harlan’s due process approach had prevailed, over the mechanistic, and almost mindless, incorporation theory, the Court would have had the necessary inducement to create meaningful protections against convicting the innocent.

A. *Does Due Process Require a Jury Trial?*

The right to a jury trial was one of the last criminal procedure rights to be incorporated.⁶⁸ One might take this as evidence of its lack of importance, but a more likely explanation is that since all states provide some kind of trial by jury in criminal cases, it just took longer to find a state system that the Court did not like. As noted earlier, the Court held in *Maxwell v. Dow*⁶⁹ that a state jury of eight was consistent with due process:

It appears to us that the question[] whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors . . . do[es] not come within the clause of the [fourteenth] amendment under consideration, so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure.⁷⁰

⁶⁷ *Id.* at 49.

⁶⁸ The Court incorporated it in 1968. See *Duncan v. Louisiana*, 391 U.S. 145 (1968). The only right incorporated later was double jeopardy. See *Benton v. Maryland*, 395 U.S. 784 (1969).

⁶⁹ 176 U.S. 581 (1900).

⁷⁰ *Id.* at 604.

As *Maxwell* makes plain, the Court had never held that a state could eliminate trial by jury but, in *Duncan v. Louisiana*, the State argued that “the Constitution imposes upon the States no duty to give a jury trial in any criminal case, regardless of the seriousness of the crime or the size of the punishment which may be imposed.”⁷¹ This was a needlessly inflated argument as Louisiana *did* provide jury trials in felony cases. All the State had to argue was that due process did not require all states to draw the jury trial line where the Sixth Amendment drew the line—crimes punishable by more than six months. Why not permit the line to be drawn at “felony” versus misdemeanor? To be sure, Louisiana defined some crimes as misdemeanors even when the authorized punishment was two years while the common law line between felony and misdemeanor was authorized punishment of one year. Duncan was charged with a misdemeanor authorizing a two-year sentence. Thus, the fight in *Duncan* was really over whether the Due Process Clause required states to provide jury trials where the authorized punishment was up to two years.

The Court held that “the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”⁷² *Duncan* is thus a classic example of incorporation. And the rationale? The Court found the right to a trial by jury in criminal cases was “fundamental to the American scheme of justice.”⁷³ No evidence exists that a jury is more likely to acquit an innocent person. But the Court focused on the “liberty” protection it seemed to find in a jury trial. At the time of the adoption of the Sixth Amendment,

[p]roviding an accused the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.⁷⁴

From there, the Court concluded: “The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.”⁷⁵

The Court’s transplanting of eighteenth century concerns with arbitrary power to the twentieth century is a tenuous argument at best. The Court conceded that a trial before a judge in modern America, as opposed to colonial America, is not inherently less fair than a trial before a jury. It is the choice to be tried by one’s peers, the “liberty” to choose, that seemed to make a jury trial “fundamental to the American

⁷¹ 391 U.S. 145, 149 (1968).

⁷² *Id.* at 149.

⁷³ *Id.*

⁷⁴ *Id.* at 156.

⁷⁵ *Id.*

scheme of justice.”⁷⁶ Gary Duncan was charged with battery, convicted by a judge, and sentenced to sixty days in jail. The most serious punishment he faced was two years in jail. If a trial to a judge is just as fair as a trial to a jury, as the Court conceded, why wouldn’t due process “justice” leave the decision about where to draw the jury-trial line up to the states, at least as long as the offense was a relatively minor one? Indeed, even redefined as a “liberty” question, it is difficult to see the liberty to choose a jury when facing assault charges as a very weighty liberty interest. I cannot improve on Justice Harlan’s observation, in dissent, about where states could draw the jury-trial line:

[U]ntil today few people would have thought the exact location of the line mattered very much. There is no obvious reason why a jury trial is a requisite of fundamental fairness when the charge is robbery, and not a requisite of fairness when the same defendant, for the same actions, is charged with assault and petty theft. The reason for the historic exception for relatively minor crimes is the obvious one: the burden of jury trial was thought to outweigh its marginal advantages. Exactly why the States should not be allowed to make continuing adjustments, based on the state of their criminal dockets and the difficulty of summoning jurors, simply escapes me.⁷⁷

To my mind, *Maxwell v. Dow* is filled with far more wisdom than *Duncan*. Indeed, the narrow holding of *Maxwell* that eight-juror verdicts are consistent with due process has been reaffirmed by the Burger Court: states can try criminal defendants with juries of as few as six.⁷⁸ Moreover, the post-*Duncan* Court has told us that verdicts based on a vote of nine to three are consistent with due process.⁷⁹ If states can ignore the common law jury rules to reduce the jury to six and to permit convictions when twenty-five percent of the jury pool voted to acquit, it is not clear to me why Louisiana had to provide a jury when trying what would have been a misdemeanor at common law.

Whether *Duncan* or *Maxwell* was right about the role of juries in providing due process, it certainly does no harm to require states to provide juries in all cases where the authorized punishment is more than six months. But the next three incorporation moves were, in my view, positively harmful to defendants.

B. Due Process Right to Counsel

The right to counsel is, to be sure, central to the goal of avoiding convictions of innocent defendants. But the Court has failed to deliver on *Gideon v. Wainwright*’s

⁷⁶ *Id.* at 149.

⁷⁷ *Id.* at 192–93 (Harlan, J. dissenting) (footnote omitted).

⁷⁸ *See Williams v. Florida*, 399 U.S. 78 (1970).

⁷⁹ *See Johnson v. Louisiana*, 406 U.S. 356 (1972).

promise to provide effective counsel to indigent defendants. The right to counsel today is satisfied when the lawyer sleeps through substantial parts of the trial;⁸⁰ when the lawyer does not interview the police officer who, according to the defendant, used a gun to coerce a confession;⁸¹ when the lawyer presents no mitigating evidence at the sentencing phase in a death penalty case even though much evidence was available;⁸² when the lawyer fails to raise the client's best argument on appeal;⁸³ and when the lawyer had a sexual relationship with his client's fiancé and thus had a motive not to transmit a plea offer.⁸⁴ In all of these cases, and hundreds more, courts have held that the defendant received everything that the Sixth Amendment right to counsel guarantees.

Without a capable lawyer, the average indigent defendant must feel abandoned in a hostile world. Here is a public defender's description of the beginning of the adjudicative process in New York City.

In disgusting pens holding as many as forty prisoners, I would interview clients. I was the first person many prisoners saw after they had spent up to four days waiting to appear before the court.

The holding pens were filled with huddling defendants, most of whom were standing because there was only one bench. Virtually the entire population of the pens was nonwhite and poor, without the resources or stable families to allow them bail. Most were in shock or panic, yelling questions and begging for help. "What am I charged with?" "When will I ever get out?" "Can you call my mother?" "What if I didn't do it; will they still keep me?" "Will you call my boss because if I don't show up I'll lose my job?"

I came to see that most of them were not really represented at all. Not only would they not make bail, but most would ultimately plead guilty to something, anything, just to move out of the system. I realized that with a lawyer who had a few days to spend with the client instead of a few minutes, a proper fight could be waged, both to get the defendant out on bail and ultimately, to get a favorable disposition.⁸⁵

The metaphor of fearful masses huddled in holding pens is, unfortunately, all too apt for the criminal justice system that exists in most states today. Suspects are lucky to have a warm body represent them and lucky to get even a few minutes to discuss

⁸⁰ *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000), *rev'd en banc*, *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001).

⁸¹ *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari).

⁸² *Id.*; see also *Romero v. Lynaugh*, 884 F.2d 871 (5th Cir. 1989).

⁸³ *Smith v. Murray*, 477 U.S. 527 (1986).

⁸⁴ *Barentine v. United States*, 728 F. Supp. 1241 (W.D.N.C. 1990).

⁸⁵ Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 59, 59-60 (1996).

their case with that warm body. Most states pay public defenders less than prosecutors and fund far fewer positions for defense than for prosecution. When private lawyers are appointed to represent indigent defendants, they are paid at a rate far lower than competent lawyers charge private clients. The *New York Times* reported that five states pay nothing toward indigent defense, relying on counties to provide funds.⁸⁶ In one county in Mississippi, appointed lawyers are paid next to nothing and sometimes coerce clients into pleading guilty.⁸⁷ To think that indigent defendants get adequate representation from overburdened lawyers working for far less than private lawyers charge is to indulge in fantasy.

The reality we see today is thus a pathetic distortion of the Court's goal in the landmark decision in *Gideon v. Wainwright*. A "poor man charged with a crime," the Court told the world, can be made "equal before the law" by providing counsel.⁸⁸ The huddled masses in the holding pens will be surprised to learn that, forty-odd years ago, the Court made them "equal [to wealthy defendants] before the law."

But, wait, I can hear the reader saying: you have just described a systemic problem with the delivery of counsel. How is incorporation to blame for that problem? I do not claim that the delivery of counsel would have been completely satisfactory in a counterfactual Harlan due process world. What I do claim, and will seek to show, is that it would have been better. The problem with the Sixth Amendment right to counsel, which is all that the Court's due process entitles defendants to receive, is that it invites a procedural focus. The Sixth Amendment, in its entirety, is about procedure. It guarantees a public and speedy trial; notice of charges; confrontation of the witnesses against the defendant; and compulsory process to obtain witnesses. Not much of substance there.

Quite in keeping with the procedural focus of the Sixth Amendment, the Court has developed a series of procedural rules about the structural right to counsel. We know with reasonable precision *who* is entitled to counsel and *when* defendants are entitled to counsel. Indigent defendants cannot be incarcerated unless they were given the right to counsel.⁸⁹ Defendants have the right to appointed counsel at the first appeal but not in subsequent appeals.⁹⁰ Defendants have no constitutional right to counsel in post-conviction proceedings, including federal habeas.⁹¹ The right to

⁸⁶ See Adam Liptak, *County Says It's Too Poor to Defend the Poor*, N.Y. TIMES, April 15, 2003, at A1, A15 (naming Mississippi, Pennsylvania, South Dakota, Utah, and Wyoming).

⁸⁷ *Id.*

⁸⁸ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁸⁹ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁹⁰ See *Douglas v. California*, 372 U.S. 353 (1963) (first appeal); *Ross v. Moffitt*, 417 U.S. 600 (1974) (discretionary appeal in state supreme court).

⁹¹ This was made painfully clear in *Coleman v. Thompson*, 501 U.S. 722 (1991), where the state habeas petitioner's counsel failed to file the petition on time and the state court dismissed it. Though the failure to perfect an appeal would clearly constitute ineffective assistance of counsel, the Court held that no violation occurred in *Coleman* because there was no right to counsel in habeas proceedings and thus no right to *effective* counsel. Coleman was electrocuted in Virginia on May 22, 1992, no court ever having heard his habeas claims.

counsel entails the procedural right to communicate with counsel and to assist in presenting a defense.⁹²

It is tempting to conclude that procedure is all the “right to the Assistance of Counsel” requires. And the Court has come very close to embracing that assumption.

To be sure, the Court insists that counsel must be “effective” but the Court’s attempt to set standards for “effective counsel” in *Strickland v. Washington*⁹³ is almost universally viewed as a failure.⁹⁴ It amounts to little more than insisting that lower courts examine the record and then instructing them to *strongly* presume competent representation: “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.”⁹⁵

Strickland’s reliance on procedure and its presumption of competent lawyering is the bitter fruit of incorporating the Sixth Amendment right to counsel into the Due Process Clause. What defendants have, in effect, is the procedural right to a licensed lawyer next to them in court (although sometimes a sleeping lawyer works just as well). A due process right to counsel that viewed “justice” as protecting the innocent would not be so easily satisfied by a procedural right to a lawyer.

For an example of how a due process right would provide both a narrower right but a more substantive one, consider *Douglas v. California*,⁹⁶ which was decided the same day as *Gideon*. The issue in *Douglas* was the constitutionality of California’s system for providing counsel for indigent defendants on their first appeal. The California system, Justice Harlan concluded in dissent, met due process requirements just fine because it required the appellate court to review the trial transcript and to appoint counsel in every case except when “in their judgment such appointment would be of no value either to the defendant or the court.”⁹⁷ In effect there was a presumption that counsel be appointed, save in cases where, after examining the substance of the case, the appeal was judged frivolous. Due process would not, Harlan concluded, require counsel to prosecute a frivolous appeal.

To the incorporationist Court, however, the issue was whether the structural right to counsel had to be extended to all defendants without regard to the likelihood of

⁹² See *Gedders v. United States*, 425 U.S. 80 (1976).

⁹³ 466 U.S. 668 (1984).

⁹⁴ See, e.g., Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 115 (1986); Stephen B. Bright, *Death By Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 692 (1990); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997); George C. Thomas III, *History’s Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543.

⁹⁵ *Strickland*, 466 U.S. at 690. *Strickland* also requires that the defendant whose lawyer has failed miserably must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. These two very high standards make winning an effective assistance claim difficult indeed.

⁹⁶ 372 U.S. 353 (1963).

⁹⁷ *Id.* at 364 (Harlan, J., dissenting) (quoting *People v. Hyde*, 331 P.2d 42, 43 (Cal. 1958)).

success on appeal. With characteristic rhetoric, Justice Douglas concluded for the Court that "the type of an appeal a person is afforded in the [California] District Court of Appeal hinges upon whether or not he can pay for the assistance of counsel."⁹⁸ But that is not a very good description of the California system. Indigent defendants were appointed counsel under the California system when it was viewed as helpful to the defendant or the appellate court. That is the critical distinction created by the state system, not a distinction based on wealth. Perhaps Douglas was drawing a distinction between individuals who had no need for counsel, but hired a lawyer anyway, and indigent defendants who had no need for counsel and could not hire a lawyer. If those are the relevant categories, then the ability to pay does determine the "type of an appeal a persons is afforded."⁹⁹

But why wouldn't the right to the assistance of counsel turn on whether the defendant needs counsel rather than whether he is unable to pay for it? Perhaps sensing this conceptual problem, the Court moved to a kind of equal protection argument: "where the merits of *the one and only appeal* an indigent has of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."¹⁰⁰

There is so much wrong with the majority opinion that pointing out the problems could fill an article by itself. Suffice to say, the equal protection move is a strange one. As Harlan noted in his dissent, if the Equal Protection Clause requires the appointment of counsel to indigents on appeal, then surely it requires the appointment of counsel to indigents at trial. Thus, the Court could have decided *Gideon* as an equal protection case without having to discuss the Sixth Amendment at all.¹⁰¹

But for my current project, the flaw in *Douglas* is the confusion of the structural appointment of counsel with the substance of effective assistance of counsel. A more narrowly-tailored system, like California's, is likely to be substantively better than the Court's system. A system that denied counsel in some subset of appellate cases should be able to provide better counsel in those cases where it would be helpful to the defendant or the appellate court. Counsel appointed by the appellate court would know that the court thought the appeal non-frivolous. Just as important, the appellate court hearing the appeal would know that a panel had previously decided the appeal might have merit. These factors could only improve the defendant's chances on appeal. In other words, a due process system that focused on the class of defendants who needed a lawyer on appeal would be preferable to an incorporation system in which everybody got a licensed lawyer, awake or not, competent or not.

The details of a due process right to counsel will be one of the subjects of a book I am now writing. In sum, I believe that due process requires indigent defendants to have a lawyer who is roughly as competent as the lawyer who represents the State.

⁹⁸ *Id.* at 355-56.

⁹⁹ *Id.* at 355.

¹⁰⁰ *Id.* at 357.

¹⁰¹ *Id.* at 363 (Harlan, J., dissenting). See DRIPPS, *supra* note 3, at 117 (arguing that *Gideon* cannot be defended as a Sixth Amendment case and is better analyzed as a due process case).

Bruce Green recommends a more rigorous licensure process, and a decertification mechanism for lawyers who later demonstrate lack of competence, in an effort to produce what he calls "qualified legal advocates" in criminal cases.¹⁰² Donald Dripps has suggested requiring judges to make an *ex ante* determination of the relative competence of opposing counsel to ensure that the defendant has a lawyer "roughly as good and roughly as well-prepared as counsel for the prosecution."¹⁰³

Both *ex ante* reform efforts are improvements over the current system. But I think a more radical reform is needed. The core of my idea is to draw defense counsel from a pool of "criminal law specialists." The State would also draw prosecutors from the same pool. The Public Defender and her chief lieutenants would remain the same, as would the District Attorney and her chief lieutenants. All other prosecutors and defenders would rotate between representing the State and representing indigent defendants. I recognize at least some of the pragmatic problems involved,¹⁰⁴ but the military uses a similar system,¹⁰⁵ and I believe the problems can be overcome.

This vision of the right to counsel provides substantive, rather than procedural, justice. It is a natural outgrowth of locating rights in a Due Process Clause that has as one of its goals the protection of innocent defendants. Though we will never know, a solution along the lines of the Green, Dripps, and Thomas proposals might have evolved if the Court had continued to refine the due process right to counsel rather than taking the easy way out and incorporating the Sixth Amendment right to counsel into the Fourteenth Amendment.

C. Due Process Right Against Unreliable Eyewitness Identification

Another example of the "wrong road taken" is the Court's failure to create a meaningful protection against unreliable eyewitness testimony. Police, prosecutors, judges, and academics have known for decades that eyewitness identification as currently conducted produces a high degree of error. Justice Frankfurter's trenchant comment was that the "identification of strangers is proverbially untrustworthy."¹⁰⁶ The Court's solution to this fundamental problem was to require, in a trilogy of cases authored by Justice Brennan in 1967, the presence of counsel when identification procedures occur after indictment and then to relegate all other questions about reliability to a "totality of the circumstances" test that rarely suppresses eyewitness testimony.

¹⁰² Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993).

¹⁰³ Dripps, *supra* note 94, at 244.

¹⁰⁴ These of course include conflicts of interest and protecting confidences. The latter problem would be particularly severe if the defendant was a repeat player through the system. But presumably repeat players would be provided a new lawyer, and the "old" lawyer would be forbidden from revealing anything she had learned during the earlier lawyer-client relationship.

¹⁰⁵ See Uniform Code of Military Justice, 10 U.S.C. §§ 806, Art. 6 & 827, Art. 27 (by implication).

¹⁰⁶ *United States v. Wade*, 388 U.S. 218, 228 (1967) (quoting FELIX FRANKFURTER, *THE CASE OF SACCO AND VANZETTI* 30 (1927)).

*United States v. Wade*¹⁰⁷ quoted Frankfurter to demonstrate the reliability problem inherent in eyewitness identification and then proceeded to require defense counsel to observe the procedures. When I first read the Court's counsel solution, it made sense to me. It no longer does. I am unclear how the presence of counsel adds substantially to the *reliability* of the identification. Lawyers are not likely to be expert in the methodology of identification procedures. While a lawyer can, presumably, help avoid the most egregious kinds of suggestive procedures, these procedures are not the real problem when police are acting in good faith, and one hopes that is the norm in this country. If it is not the norm, then we have far deeper problems than unreliable eyewitness identifications. If police are acting most of the time in good faith, the problems will typically be subtle and unintentional. These will fly under the radar screen of lawyers.

Providing the right to counsel to suspects who face an eyewitness identification is not unlike providing a lawyer who can observe the grand jury deliberate but has no right to object. This lawyer could later testify that the prosecutor intimidated or coerced the grand jury when the lawyer observed such conduct, but the more subtle errors (police testimony that shades the evidence toward the State) will go undetected, and the grand jury will indict in almost all cases whether the lawyer is there or not. Moreover, to the extent it is a good idea to have a lawyer observe the identification process, the Court in *Wade* made a pretty serious error. It permitted the State to argue that even when counsel was not present, the in-court identification can be shown to be independent of the Sixth Amendment violation.

If police wish to use a blatantly unfair identification procedure and do not want a defense lawyer present, they might decide it is worth taking a chance that a prosecutor can wiggle out of the *Wade* suppression remedy. To be sure, the Court was clear in *Gilbert v. California*¹⁰⁸ that the *out-of-court* identification is categorically inadmissible if the right to counsel is violated, but imagine that you are a prosecutor and could get a court to permit the witness to identify the defendant in court. Would you care that the out-of-court identification was suppressed? I can't imagine why you would.

A companion case to *Wade* and *Gilbert* was *Stovall v. Denno*.¹⁰⁹ While Justice Brennan's opinions in *Wade* and *Gilbert* are unpersuasive and superficial, his opinion in *Stovall* is a disaster. Five police officers and two members of the District Attorney's office brought the suspect, handcuffed to one of the officers, to the hospital room of the victim. The victim had told police that the perpetrator was a black man. The suspect was the only black man in the room. The victim identified him after he repeated "a few words for voice identification."¹¹⁰ It is difficult to imagine a more suggestive procedure, and yet, the Court affirmed the conviction on the ground that

¹⁰⁷ 388 U.S. 218 (1967).

¹⁰⁸ 388 U.S. 263 (1967).

¹⁰⁹ 388 U.S. 293 (1967).

¹¹⁰ *Id.* at 295.

the witness was in the hospital for major surgery necessitated by the criminal attack on her.

It is hard for me to believe that Brennan wrote *Stovall*. The Court did not even insist that the eyewitness be in a critical medical condition. It spoke only of her having to undergo emergency surgery. Perhaps Brennan's unresponsiveness to the reliability problem was because he thought that he had solved the main part of the problem in the *Wade-Gilbert* cases. If suspects routinely were provided counsel, except when witnesses were severely injured, then counsel would be available to police the identification procedure in ninety-nine percent of the cases. Justice Brennan clearly had higher hopes for what lawyers can accomplish as observers than I do. Granting him his premise, he might have thought that he had won a great victory on the counsel front so why not "throw a bone" to police and prosecutors in *Stovall* and permit some flexibility when there is a risk that a witness might die?

The problem is that the *Wade-Gilbert* rule quickly became a one percent solution rather than a ninety-nine percent solution. Leaving aside entirely whether providing a lawyer is an effective way to police the identification procedure, another cost of incorporation was that Brennan's Sixth Amendment solution ran into an interpretive buzz saw. The Sixth Amendment applies only to "criminal prosecutions." It is difficult to argue that a show-up shortly after an arrest is part of a "criminal prosecution." While this textual limitation did not impede the Warren Court—in *Escobedo v. Illinois*¹¹¹ the Warren Court held that a pre-trial interrogation could, in some cases, be part of a criminal prosecution—the Burger Court was not inclined to expand Warren Court criminal procedure precedents.¹¹² Five years after *Wade*, the Court could not muster a majority to apply its counsel rule to pre-indictment lineups.¹¹³ Almost all eyewitness identifications occur prior to indictment because they are an investigative tool used by police to decide whether they have arrested the right suspect. Thus, the great victory in *Wade* and *Gilbert* turned to ashes, and the losers were not guilty criminal defendants but the innocents who do not need a lawyer but do need a due process protection against unreliable identifications that is more precise and more robust than the vague mess that is *Stovall*.

If requiring counsel to observe identification procedures was a good idea, the Court could have found that requirement in the Due Process Clause. Then the Sixth Amendment interpretive difficulty would not have sabotaged the counsel solution. But blinded by incorporation, the Warren Court bet the house on the Sixth Amendment. And lost.

The real harm in the *Wade* trilogy was the Court's indifference to the threat to innocent suspects. Perhaps because *Stovall* is such a bad opinion, or perhaps because the Burger Court thought the threat to innocent defendants was not all that great, the Court in the 1970s began to narrow further the already-narrow compass of *Stovall*. In

¹¹¹ 378 U.S. 478 (1964).

¹¹² See BRADLEY, *supra* note 1, at 33 (concluding that the Burger Court put an end to the Warren Court criminal procedure by "refusing to extend and, sometimes narrowing, its major holdings").

¹¹³ Kirby v. Illinois, 406 U.S. 682 (1972) (plurality opinion).

1977, *Manson v. Braithwaite*¹¹⁴ held that due process would permit the State to use an identification that the State *conceded was the product of a procedure that was both suggestive and unnecessary*.¹¹⁵ Rather than manifest any real concern about the risk of false identification, the Court has crafted a “totality of the circumstances” test that is completely malleable. If a trial court wants to admit an identification that came from a suggestive, unnecessary procedure, it can do so.

If the Warren Court had used the Due Process Clause as the vehicle for addressing the entire identification problem rather than dumping what it thought was ninety-nine percent of the problem into the Sixth Amendment bin, it likely would have devised a better set of procedures or at least written an opinion that would have opened the door to a better set.¹¹⁶ *Stovall* should have focused on how the “process” of identifying suspects can be improved, rather than speak generally of reliability and then create an exception for exigent circumstances. A better rule would be that all identification procedures come with a presumption of unreliability unless the eyewitness is first shown a lineup or photo array that does *not* include the suspect. Perhaps all procedures should be conclusively presumed unreliable unless the officer conducting the identification procedure does not know which photo or person in the lineup is the suspect. Much could have been done here but little was done because the Court initially relied on the Sixth Amendment that it incorporated into the Fourteenth Amendment. This is just another example of how the Court took the easy road of incorporation and innocent defendants have suffered.

D. Interrogation and Due Process

In its rush to bring standard procedures to the interrogation room, the *Miranda* Court ignored the problem of false confessions.¹¹⁷ Though I once believed that only a mentally ill person would confess falsely, thanks to Richard Leo, I now see the problem as more complicated and more likely to ensnare innocent suspects who are not mentally ill. The most important factor that I had ignored was that suspects do not have to “confess” the way they do to Columbo or Perry Mason to lead to the introduction of false or misleading evidence of their guilt. An innocent suspect can tell his story in different ways, either because he remembers it differently or because the earlier version did not persuade his interrogators. An innocent suspect can agree

¹¹⁴ 432 U.S. 98 (1977).

¹¹⁵ *Id.* at 109.

¹¹⁶ See DRIPPS, *supra* note 3, at 118 (“A Court less obsessed with selective incorporation would not have looked to the right to counsel as the principal security against erroneous eyewitness identifications.”).

¹¹⁷ Consensus is growing that *Miranda* fails to prevent a substantial number of false confessions from being admitted against innocent defendants. See George C. Thomas III, *Miranda's Illusion: Telling Stories in the Police Interrogation Room*, 81 TEX. L. REV. 1091 (2003) (reviewing WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS* (2001)); see also Richard A. Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1988).

with statements, more or less true on their face, that might later be linked to other statements that falsely suggest guilt. An innocent suspect can, out of desperation, claim a false alibi or seek to shift the blame to another innocent person. And an innocent suspect can, out of desperation, agree when police suggest she might have done it but cannot now remember doing it.

A range of factors could influence innocent suspects who are not mentally ill to make mistakes like the ones noted in the last paragraph. Suspects may be timid, fearful of authority, young, old, drunk, high, boastful, liars, arrogant, exhausted, sleepy, or desperate for the interrogation to end. Ironically, suspects may be too trusting in the system, assuming that if they overstate their alibi or agree with a marginally true statement, the system will not convict them. Remember, they are innocent and, not being mentally ill, they know they are innocent. Many of these factors can operate in conjunction. Consider the case of Michael Crowe, a young, fearful, exhausted fourteen-year-old boy suspected of the murder of his sister. The interrogators accuse him over and over during a ten-hour interrogation that spanned three days.¹¹⁸ Having waived *Miranda*, with his parents not present for the interrogation, he faces his interrogators alone. At some point, he must wonder whether the interrogation will ever end. How can it end? How can he persuade his interrogators to believe him?

To compound the desperate situation described above, the police can heighten the likelihood of a false confession in a variety of ways. They are permitted by the United States Supreme Court to present the suspect with false evidence of guilt and, once a *Miranda* waiver has been obtained, to interrogate literally without an end, as long as the interrogators permit breaks for sleep and food. Some of the false evidence that can be used to confront the suspect can be pretty powerful. In the case of Michael Crowe, the police utilized a "Computer Voice Stress Analyzer" that police told him was both scientific and accurate.¹¹⁹ When Crowe accurately stated his innocence again and again, the police told him that he had failed the test and that the failure "established his guilt conclusively. Crowe was devastated and began to sob almost uncontrollably."¹²⁰ Finally, seemingly out of options, truly desperate, he "began to admit the possibility that he could have done it without remembering."¹²¹ He finally said he must have done it "because the evidence says I did. You could find someone else did it—and I pray to God someone else did."¹²² Crowe was charged with murder but the charges were dismissed when the sister's blood was found on the shirt of a "mentally ill drifter who several people had reported in the Crowe neighborhood and

¹¹⁸ RICHARD A. LEO, POLICE INTERROGATION AND THE AMERICAN PROCESS OF JUSTICE (forthcoming 2007) (manuscript of ch. 4, at 24).

¹¹⁹ *Id.* at 25.

¹²⁰ *Id.*

¹²¹ *Id.* at 26.

¹²² *Id.* at 27.

acting suspiciously the night of the murder."¹²³ By the time the charges were dismissed, Crowe had spent seven months in detention in juvenile hall.¹²⁴

Miranda and subsequent Supreme Court decisions permit all the police techniques described above. How could the Court have been so wrong in believing that a routinized set of warnings, delivered once, would be a powerful antidote to police pressure and trickery? We must remember that *Miranda*, like all of us, was a product of its times. In the mid-1960s, Americans believed that we were the masters of our fate. We had helped win World War II, saving the world from Fascism. We had achieved a stable, if tense, stalemate with the Soviet Union. We were the most powerful, and richest, country on Earth. We had yet to navigate the mine fields of Vietnam, Watergate, and OPEC. We had yet to discover that J. Edgar Hoover and the I.R.S. were capable of quite un-American deeds.

We believed in government, in the police, and in ourselves. Give police the right set of guidelines, give suspects the right set of instructions, and the interrogation problem would be largely behind us. And the suspects who waive *Miranda* and are subjected to endless interrogation that leaves them hopeless? Why, they are not hopeless at all. The Court in *Miranda* was careful to stress that no waiver was permanent.¹²⁵ The suspect could invoke at any time. Hopeless? *Miranda* was an eternal font of hope.

There are, we see now, two profound problems with *Miranda* as a font of hope. First, humans are hardly the masters of their fate that many assumed in the 1960s. We are much closer to Dostoevski's Raskolnikov than Ayn Rand's John Galt.¹²⁶ The second flaw is in *Miranda* itself: even assuming free will actors modeled somewhat along the lines of John Galt, the *Miranda* warnings need be given only once, *and they do not tell the suspect that he can invoke at any time, even after waiver*. Most suspects who waive their *Miranda* rights probably assume there is no turning back. And so they don't turn back but get ensnared in stories that incriminate them. Thus, we see that *Miranda*, the great victory for the powerless in our society, simply whetted the police appetite for better forms of interrogation, which are more likely to persuade the innocent to say something damning. Richard Leo reports almost three hundred documented cases of false confessions since the late 1980s.¹²⁷

Was there another route had the Court not gone for the quick-fix (that turned out to be a mirage) in *Miranda*? Perhaps the question is better asked as follows: given that *Miranda* clearly puts innocent suspects at risk, is there anything the Court can do now to remedy the situation in which we find ourselves? There are no magic bullets.

¹²³ *Id.* at 28.

¹²⁴ *Id.*

¹²⁵ See *Miranda v. Arizona*, 384 U.S. 436 at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

¹²⁶ See FYODOR DOSTOEVSKI, *CRIME AND PUNISHMENT* (1866); AYN RAND, *ATLAS SHRUGGED* (1957).

¹²⁷ LEO, *supra* note 118, at 7.

The magic bullet of *Miranda* was a failure, and the Court should give up the search for a magic bullet that will solve any problem connected to police interrogation.

But there are things that can be done. The *Miranda* warnings could be expanded to include the right to invoke at any time whether or not the suspect has waived, something along the lines of "You can invoke your right to silence or to counsel at any time and whether or not you have signed a waiver or begun talking to us." Since my view of humans is decidedly closer to Dostoevski's than Ayn Rand's, I would not expect that to have much effect. More likely to be helpful are the set of ideas already put forward by Richard Leo.¹²⁸ On motion by a defendant that his statements made to police are untrue, a court should conduct a searching inquiry into the reliability of the statement and not simply ask whether it was "involuntary" (whatever that means) or whether it was produced by coercive police interrogation. Those questions may be relevant to the question of reliability but they are not co-extensive.

Richard Leo and Richard Ofshe have suggested that, as an additional inquiry, courts should examine "the fit between the suspect's post-admission narrative . . . he or she offers . . . and the facts of the crime. A guilty confessor will have personal knowledge of the crime, but an innocent confessor will be ignorant of many crime facts."¹²⁹ Once a judge has inquired into the facts surrounding the interrogation and compared the story told by the suspect to the one suggested by the facts of the crime, what then? In a truly inspired move, Leo and Ofshe have suggested that judges transplant into the Due Process Clause the same admissibility standard that the federal rules mandate for deciding the admissibility of evidence generally: "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."¹³⁰

What makes the Leo-Ofshe idea such a good one is that it draws on an evidentiary protection that already exists and that has the same goal that due process should have in the confessions context. A confession that bears a fair risk of being false carries with it an enormous risk of unfair prejudice. Precisely how much risk that a confession is false is too much would be left for courts. But the critical move is that due process requires courts to make an inquiry. Judges should not be permitted to do what they do today: assume that if a *Miranda* waiver is voluntary, the resulting statements are almost always both voluntary and reliable.¹³¹ Will courts make mistakes and let in some false confessions and exclude some true ones? Yes, but at least they will be more likely to suppress false confessions than they are today. At

¹²⁸ See, e.g., Richard A. Leo, *Miranda and the Problem of False Confessions*, in *THE MIRANDA DEBATE: LAW, JUSTICE, AND POLICING* 271, 271–82 (Richard A. Leo & George C. Thomas III eds., 1998).

¹²⁹ Leo, *supra* note 128, at 278 (citing Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 *STUD. L. POL. & SOC'Y* 189 (1997)).

¹³⁰ *FED. R. EVID.* 403. Leo makes this suggestion at Leo, *supra* note 128, at 278.

¹³¹ For some observations, based on a sample of cases, about the willingness of courts to assume that *Miranda* solves voluntariness problems, see Thomas, *supra* note 50.

least judges will be asking the right set of questions. Moreover, as Donald Dripps has argued, using the Due Process Clause to regulate police interrogation would also permit courts to develop bright-line time limits or requirements about taping interrogations.¹³² If *Miranda* is so deeply embedded that it prevents the evolution of ideas like the ones set out in this Part, “[a]ll the more reason, then, to regret the due process road not taken.”¹³³

To this point I have argued that an invigorated Due Process Clause, with innocence as its principal focus, would cause the formal doctrine to be different in the right to a jury trial context. States could limit juries in criminal cases as they saw fit. In the right to counsel area, the formal doctrine would look the same at the level of the structural right to counsel, at least prior to the appellate process,¹³⁴ but the implementation would be very different. Indigent defendants would be provided counsel of roughly comparable ability and dedication as the lawyers who are prosecuting them.

In the eyewitness identification area, part of the doctrine would be different—the right to counsel would either be abolished or extended to all lineups and show-ups without regard to whether an indictment had been returned. Part of the doctrine would be the same but would be implemented very differently. Suspects would still have the right not to be subjected to a procedure that carries the risk of an erroneous identification, but the right would be implemented by a series of requirements much more exacting than the current “totality of the circumstances” test. Interrogation law would be different in at least two ways. A statement that the suspect can invoke silence or counsel at any time should be added to the standard *Miranda* warnings. More importantly, due process would require judges to make a searching inquiry into the reliability of a statement made in response to interrogation if the defendant claims that the statement is untrue.

IV. LOOKING BACK AND FORWARD: WHERE DO WE GO FROM HERE?

Incorporation was the wrong criminal procedure road taken for many reasons. At the time, most of the criticism focused on the problem of forcing the states to a monolithic model. Noting that “the States under our federal system have the principal responsibility for defining and prosecuting crimes,”¹³⁵ Justice Harlan argued that incorporation “endangers this allocation of responsibility for the prevention of crime when it applies to the States doctrines developed in the context of federal law

¹³² See DRIPPS, *supra* note 3, at 120.

¹³³ *Id.*

¹³⁴ At the appellate stage, I believe due process permits states to have a procedure like California had prior to *Douglas v. California*, see *supra* notes 96–98 and accompanying text, where courts could refuse to appoint counsel if the appeal is in their judgment frivolous.

¹³⁵ *Malloy v. Hogan*, 378 U.S. 1, 28 (1964) (Harlan, J., dissenting) (quoting *Abbate v. United States*, 359 U.S. 187, 195 (1959)).

enforcement, without any attention to the special problems which the States as a group or particular States may face.”¹³⁶

Justice Harlan also saw the second, and more ominous, problem with incorporation: the watering down of rights across the board. He contemplated that if the states began to fail in their responsibility to protect citizens, “the likely consequence is a shift of responsibility in this area to the Federal Government, with its vastly greater resources.”¹³⁷ That shift did not happen with traditional crimes, in large part because the Warren Court revolution produced little in terms of real protection for guilty criminals. But when the war on drugs became a political darling of both political parties, vast federal resources were tapped for much of this war. And most commentators agree that the war on drugs was instrumental in watering down the robust rights that federal criminal suspects and defendants enjoyed in the pre-incorporation days. Harlan was thus right when he said:

Such a shift, if it occurs, may in the end serve to weaken the very liberties which the Fourteenth Amendment safeguards by bringing us closer to the monolithic society which our federalism rejects. Equally dangerous to our liberties is the alternative of watering down protections against the Federal Government embodied in the Bill of Rights so as not unduly to restrict the powers of the States.¹³⁸

There was a third flaw in the Court’s incorporation move, one that no one saw at the time. With its eye squarely on the criminal procedure rights in the Bill of Rights, fighting first to have them incorporated and then fighting long, costly battles over the meaning of these rights, the right of an innocent person not to be convicted was no longer in the Court’s field of vision. That, to me, is the greatest harm of incorporation.

While Justice Harlan did not mention specifically the protection of innocent suspects and defendants as a virtue of a due process approach, he did appreciate that due process protection can adjust more easily to changes in society.¹³⁹ In Justice

¹³⁶ *Id.* at 28.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ This of course was Justice Black’s principal concern with using due process to regulate state procedures. He argued against applying a due process standard that would invalidate laws that are “offensive to a ‘sense of fairness and justice.’” *Griswold v. Connecticut*, 381 U.S. 479, 511 (1965) (Black, J., dissenting). This was, to Black’s mind, to “require judges to determine what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body.” *Id.* at 511–12. But I cannot believe that anyone, in the year 2005, really believes the Supreme Court is hamstrung by the text of the Constitution. Indeed, two years following *Griswold*, the Court proved that it could take the literal language of the text of the Fourth Amendment and do whatever it wished, finding that spoken conversations are “persons” protected by the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967). Black dissented there, too, of course: “I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage.” *Id.* at 373

Harlan's words, "continuing re-examination of the constitutional conception of Fourteenth Amendment 'due process' of law is required, and that development of the community's sense of justice may in time lead to expansion of the protection which due process affords."¹⁴⁰

Of course, there are few second acts in constitutional jurisprudence. No Court in the foreseeable future is going to re-consider *Marbury v. Madison*,¹⁴¹ *Brown v. Board of Education*,¹⁴² or *Baker v. Carr*.¹⁴³ While the cases incorporating the criminal procedure guarantees are less secure than these cases, it remains unlikely (to put it mildly) that the Court will read my article and decide to overrule eight major cases that accomplished the incorporation of the criminal procedure rights.¹⁴⁴ But the Court can do a few things to recognize that due process requires protection of the innocent.

At a minimum, the Court could recognize, finally, that due process provides independent soil in which to grow innocence-protecting doctrines. At a minimum, the Court should disavow the dictum in *Herrera v. Collins*,¹⁴⁵ where the Court wrote: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."¹⁴⁶ According to this dictum, a violation of a procedural right is more important to a federal habeas claim than newly-discovered proof that the State convicted an innocent defendant. The Due Process Clause, in my view, requires precisely the opposite scale. Protecting innocence is more important than providing procedural niceties.

Justices Scalia and Thomas have taken an even more stinting view of innocence, concluding in their concurring opinion in *Herrera* that "[t]here is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction."¹⁴⁷ It is, to me, unimaginable that the Scalia-Thomas dictum could have grown in the soil of Justice Harlan's expandable due process world. I think it time to return to the past and reclaim at least part of that

(Black, J., dissenting). To me, the idea that any provision in the Bill of Rights can be given a literal reading that keeps the Court from reaching decisions based on its sense of what is the best outcome is really quite daft.

¹⁴⁰ *Malloy*, 378 U.S. at 15 (Harlan, J., dissenting).

¹⁴¹ 5 U.S. (1 Cranch) 137 (1803).

¹⁴² 347 U.S. 483 (1954).

¹⁴³ 369 U.S. 186 (1962).

¹⁴⁴ See *supra* notes 15–23 and accompanying text for the cases and the rights they incorporated.

¹⁴⁵ 506 U.S. 390 (1993).

¹⁴⁶ *Id.* at 400.

¹⁴⁷ 506 U.S. 390, 427–28 (1993) (Scalia, J., concurring). For criticisms of *Herrera*, see Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501 (1996); Vivian Berger, *Herrera v. Collins: The Gateway of Innocence for Death Sentenced Prisoners Leads Nowhere*, 35 WM. & MARY L. REV. 943 (1994); George C. Thomas III et al., *Is it Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263 (2003).

world. At a minimum, courts should adopt due process doctrines that help protect innocent suspects and defendants.

